SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

ALTERRA AMERICA INSURANCE CO., et al., Plaintiffs, - against - NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652813/2012 **E** Hon. Andrea Masley Mot. Seq. 018
DISCOVER PROPERTY & CASUALTY COMPANY, et al., Plaintiffs, - against - NATIONAL FOOTBALL LEAGUE, et al., Defendants.	Index No. 652933/2012 **E** Hon. Andrea Masley Mot. Seq. 022

MEMORANDUM OF LAW IN OPPOSITION TO INSURERS' MOTION FOR PARTIAL REVIEW OF MEMORANDUM AND ORDER OF SPECIAL REFEREE MICHAEL DOLINGER REGARDING MOTION TO COMPEL PRODUCTION OF UNDERLYING LITIGATION AND SETTLEMENT MATERIALS

John E. Hall
COVINGTON & BURLING LLP
620 Eighth Avenue
New York, NY 10018
(212) 841-1000

Mitchell F. Dolin
Michael E. Lechliter
Colin P. Watson
COVINGTON & BURLING LLP
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Attorneys for Defendants National Football League and NFL Properties LLC

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Defendants the National Football League and NFL Properties LLC (together, "the NFL parties") respectfully submit this memorandum of law and the affirmation of Colin P. Watson ("Watson Aff.") in opposition to the Insurers' Motion for Partial Review of Memorandum and Order of Special Referee Michael Dolinger Regarding Motion to Compel Production of Underlying Litigation and Settlement Materials.

PRELIMINARY STATEMENT

The instant motion is one of three filed by the Insurers challenging key aspects of the Special Referee's careful, balanced, and thorough 80-page opinion, which ruled for and against each side after extensive briefing and eight hours of oral argument on the five motions pending before him. The NFL parties have chosen not to challenge those aspects of the opinion that denied the relief they sought whereas the Insurers are seeking to overturn portions of the opinion that correctly rejected their arguments. This and the Insurers' other two motions seeking review should be denied as meritless.

In their underlying motion to compel that is the subject of this motion for partial review, the Insurers sought the NFL parties' "defense file" for the underlying player concussion litigation, by which they meant information that is in the files of the NFL parties' outside defense counsel at Paul Weiss and plainly protected by the attorney-client privilege and the work product doctrine. The Insurers told the Special Referee that he should ignore the privilege because the so-called "cooperation" clauses in their insurance policies and the parties' purported "common interest" in defeating the underlying tort litigation mean that such information is not privileged or otherwise protected vis-à-vis the Insurers. They also offered a fallback argument that they are entitled to this privileged and protected information because the NFL parties have supposedly put the information "at issue."

In a detailed decision addressing all points raised by the parties, Special Referee Dolinger correctly rejected each of these arguments as running into a solid wall of controlling New York precedent, including recent decisions by this Court and the First Department. That law unambiguously holds that: (1) insurance policy "cooperation" clauses do not override an insured's attorney-client privilege or work product protection; (2) the "common interest" doctrine does not require the production of protected documents in any setting, much less in a lawsuit such as this where insurers are seeking to avoid coverage and are adverse to their policyholders; and (3) a party does not put its privileged and protected information "at issue" by filing a coverage lawsuit and arguing that a settlement for which it seeks coverage was reasonable. As we demonstrate below, the relevant case law is on point, dispositive, and inarguable. Indeed, the Insurers do not seriously pretend otherwise.

Instead, now that they have lost on the arguments they made below, they try to repackage them before this Court. They essentially admit that neither the cooperation clause nor the common interest doctrine alone requires the NFL parties to produce their defense file to the Insurers. Rather, they argue that a purported "interplay" between the cooperation clauses and the common interest theory requires that result. But the Insurers cannot dispute the body of New York case law rejecting cooperation *and* common interest arguments, and they concede that their new "interplay" argument has *never* been adopted in New York. Moreover, the Insurers' repackaged argument is based almost entirely on a mischaracterization of a discredited Illinois decision that has never been the law in New York.

With respect to "at issue" waiver, the Insurers continue to argue that the filing of a lawsuit can trigger a waiver, but now add that—although the NFL parties have *not to date* actually placed privileged advice at issue—the NFL parties will likely do so *in the future*. On

this point, the Special Referee has given them appropriate relief by making clear that the Insurers can return to court if, in the future, the NFL parties do in fact place legal advice at issue. For now, the controlling New York case law makes clear there is no basis for further relief.

BACKGROUND

A. The Underlying Litigation and Defense

In 2011, hundreds of former professional football players began filing suits against the NFL parties claiming that they negligently failed to protect players from risks of brain injuries allegedly caused by concussive and sub-concussive head impacts. These cases were soon consolidated as a multidistrict litigation in the U.S. District Court for the Eastern District of Pennsylvania (the "MDL"). *In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. 351, 361 (E.D. Pa. 2015). By 2015, more than 300 suits brought by or on behalf of approximately 5,000 retired NFL players were included in the MDL. *Id.*

The NFL parties began notifying their Insurers of the underlying claims shortly after the first lawsuit was filed in July 2011. None of the Insurers agreed to provide coverage. As the Special Referee found, the "carriers either denied liability coverage or reserved on coverage." Mem. & Order at 3; *see also* Carroll Aff. Ex. 3 at Watson Aff. ¶ 4.[1] And, in 2012, the Insurers initiated coverage litigation in this Court and filed pleadings "to the effect that they were not required to provide coverage for defense costs or liability expense." Mem. & Order at 5; *see also* Carroll Aff. Ex. 3 at Watson Aff. Exs. 12–15.

[1] Exhibit 3 to the Affirmation of Christopher R. Carroll, dated March 14, 2019 ("Carroll Aff."), contains the NFL parties' initial opposition papers before the Special Referee, including the Affirmation of Colin P. Watson and its 29 attached exhibits.

As for the Insurers that issued primary policies that included defense coverage, "none assumed the defense" of the NFL parties, and the NFL parties proceeded to retain and pay for defense counsel led by the Paul Weiss law firm. Mem. & Order at 3; *see also* Carroll Aff. Ex. 3 at Watson Aff. ¶ 5. When the primary-layer insurers did take a position on defense coverage, they broadly reserved rights and merely agreed to "participate" and to reimburse after-the-fact a fraction of the defense costs as opposed to assuming the actual and complete defense of their insureds. *Id.* Accordingly, as of September 20, 2018, the NFL parties had incurred after seven years of litigation approximately $[redacted] million in defense costs, of which their insurers had reimbursed on a delayed basis a cumulative total of only about 35%. *Id.* at Watson Aff. ¶ 17. And, as discussed below, the defense costs pale in comparison to the more than $500 million in settlement costs incurred by the NFL parties, *none* of which have been reimbursed by the Insurers.

B. The Class Action Settlement

In August 2013, as a result of mediated negotiations, the NFL parties and plaintiffs' representatives reached agreement on a term sheet that included $765 million in payments. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 307 F.R.D. at 364. After the settlement was documented over the next several months, class counsel sought preliminary approval from the MDL court. *Id.* In January 2014, the court denied preliminary approval, primarily out of concern that the capped fund might exhaust before the 65-year life of the settlement ran its course. *Id.*

After several more months of negotiations supervised by an independent Special Master appointed by the MDL court, the NFL parties and underlying plaintiffs' representatives reached a revised agreement that, among other things, uncapped the overall settlement fund, but retained the caps on individual awards. *Id.* The MDL court preliminarily approved the revised settlement

agreement in July 2014. *Id.* at 365. After class-wide notice and further proceedings in which the settlement was subjected to extensive scrutiny, including by objectors who argued that the settlement was too favorable to the NFL parties, the MDL court granted final approval in April 2015. *Id.* at 424–25. The MDL court did so only after carefully examining the exposure and risks to both sides in the underlying litigation, as well as the fairness of the negotiations that led to the compromise settlement. *Id.* at 388–96.

The Insurers were contemporaneously briefed on the negotiations that began in 2013 and culminated in the final settlement approved by the MDL court in 2015. Mem. & Order at 3–5. The briefings were both oral and in writing and were expressly made subject to written understandings in confidentiality agreements that provided non-waiver assurances to the NFL parties and limited the litigation use of such briefings to disputes about the reasonableness of the settlement. *Id.* In a separate portion of his opinion, the Special Referee has enforced those understandings. *Id.* at 25–46. During the class settlement negotiations, the Insurers were asked repeatedly to consent to the proposed settlement or to affirm that they would not later seek to avoid coverage on the basis that the NFL parties lacked insurer consent to settle. *Id.* at 4–5. Many insurers made that commitment, while others either did not respond or explicitly refused to consent to the proposed settlement. *Id.*

The U.S. Court of Appeals for the Third Circuit affirmed the MDL court's approval of the class settlement in April 2016. *See In re Nat'l Football League Players' Concussion Injury Litig.*, 821 F.3d 410 (3d Cir. 2016). In December 2016, the U.S. Supreme Court denied petitions for certiorari. *See, e.g.*, *Armstrong v. Nat'l Football League*, 137 S. Ct. 607 (2016). The class settlement took effect on January 7, 2017. Carroll Aff. Ex. 3 at Watson Aff. ¶ 22. The class settlement did not conclude the underlying litigation. Dozens of retired NFL football players or

their family members opted out of the settlement class. *See id.* at Watson Aff. ¶ 23; *id.* at Watson Aff. Ex. 10.

As of September 2018, the class settlement administrator had given notice of monetary awards totaling more than $500 million, funded entirely by the NFL parties. *Id.* at Watson Aff. ¶ 24; *id.* at Watson Aff. Ex. 11. As noted above, the Insurers have not paid or reimbursed any of those costs. *Id.* at Watson Aff. ¶ 24.

C. This Insurance Coverage Litigation

During the period in which the class settlement was negotiated and then reviewed by the trial and appellate courts, the parties to this coverage litigation abided by a stay. The stay was lifted after the Third Circuit affirmed the approval of the class settlement.

Subsequently, the NFL parties filed amended cross-claims and counterclaims in the coverage action, seeking damages, a declaratory judgment regarding certain of the Insurers' defense obligations, a declaratory judgment regarding all of the Insurers' indemnification obligations, and a declaration that certain Insurers had unjustifiably and in bad faith failed or refused to consent (or to waive any defense based on lack of consent) to the class settlement. Carroll Aff. Ex. 3 at Watson Aff. Ex. 16 at 41–48. The Insurers denied the NFL parties' claims and asserted an array of purported defenses to coverage, including that the class settlement supposedly was "excessive or unreasonable," and certain of them asserted that "no coverage is available . . . for any settlements . . . made without the [Insurers'] consent." *Id.* at Watson Aff. Ex. 17 at 30.

In February 2017, the Insurers served the NFL parties with almost one hundred separately enumerated document demands, insisting that the NFL parties produce, among other things, what the Insurers call the "underlying defense and settlement files maintained by the [NFL parties'] defense counsel." Insurer Mem. 1. Although the NFL parties appropriately objected to aspects

of the Insurers' demands, the Insurers concede that the NFL parties agreed to produce a [redacted] of documents. In fact, to date the NFL parties have produced more than [redacted] pages of documents. Carroll Aff. Ex. 3 at Watson Aff. ¶ 35. Those productions reflect the NFL parties' reasonable efforts to identify and disclose non-privileged documents in the NFL parties' files concerning, among other things, a host of facts at issue in the underlying litigation, [redacted]. *Id.* at Watson Aff. ¶ 36. The NFL parties have also agreed to produce, from the underlying tort litigation itself, various types of tort litigation documents, and have agreed to provide extensive information about the administration of claims under the class settlement. *Id.* at Watson Aff. Ex. 21 (Response No. 90); Mem. & Order at 55. The foregoing categories are in addition to the substantial pleadings files produced or available from the underlying tort litigation. Carroll Aff. Ex. 3 at Watson Aff. ¶ 37.

In parallel with this significant party discovery, the Insurers have also pursued extensive discovery from third parties, including dozens of doctors with current or former relationships with the NFL parties (such as members of the NFL's Mild Traumatic Brain Injury or MTBI Committee); the thirty-two NFL Member Clubs; the American Association of Neurological Surgeons and the Congress of Neurological Surgeons, both of which have been involved in the publication of information regarding head injuries in football; the Foundation for the National Institutes of Health, which has funded research regarding head injuries in football; and insurance brokers. *Id.* at Watson Aff. ¶ 38. The NFL parties are aware that, as of September 2018, these subpoenas had yielded more than [redacted] pages of documents. *Id.* The discovery efforts by the Insurers are ongoing. *Id.*

At the same time that the NFL parties' productions were rolling out, the parties engaged in a months-long meet-and-confer process, during which the Insurers insisted that the NFL parties were required to produce the defense file created and maintained in connection with the defense and settlement of the underlying litigation, specifically documents created and maintained by the NFL parties' outside counsel at the Paul Weiss firm. *Id.* at Watson Aff. Ex. 22. The NFL parties told the Insurers on multiple occasions that their defense file demand implicated privileged and protected information and was overbroad.

The Insurers, however, steadfastly refused to narrow the requests or to support their privilege position. On February 2, 2018, the parties submitted a joint letter to the Court in which they outlined certain discovery issues on which the parties had apparently reached an impasse, including the production of the NFL parties' defense file. *Id.* at Watson Aff. Ex. 28.

D. Proceedings Before Special Referee Dolinger

Following a conference with the Court on February 6, 2018, all parties agreed to the appointment of Hon. Michael Dolinger (Ret.), formerly a magistrate judge on the U.S. District Court for the Southern District of New York, to act as a special discovery referee. On April 30, 2018, the Court entered a stipulated order appointing Judge Dolinger to serve as Special Referee. Carroll Aff. Ex. 7.

On August 21, 2018, following a hearing before the Special Referee, the parties submitted five discovery motions for resolution. Relevant here, the Insurers moved for an order compelling production of the NFL parties' "defense file," targeting information in the possession of the Paul Weiss firm that indisputably is protected by the attorney-client privilege and work product doctrine, including such core protected materials as the NFL parties' [redacted]

Carroll Aff. Ex. 1 at Insurer Mem. 2. The NFL parties opposed the motion on September 21,

2018. Carroll Aff. Ex. 3. The parties subsequently exchanged reply and surreply papers. Carroll Aff. Exs. 4–6. The Special Referee held oral argument on November 27, 2018, and on this particular motion heard from five different lawyers representing Insurers and from the NFL parties' counsel. Watson Aff. Ex. 1.

On February 28, 2019, the Special Referee issued his Memorandum & Order resolving all pending motions. The Special Referee denied in full the Insurers' motion to compel production of the defense file. Mem. & Order at 6–25. In so doing, he thoroughly addressed the parties' arguments and carefully explained that controlling First Department law was contrary to each of the legal arguments that the Insurers had advanced in support of their motion. *Id.*

In the same ruling, the Special Referee granted in part a protective order motion filed by the NFL parties, *id.* at 25–46, and partially granted and partially denied the "omnibus" motions to compel non-privileged discovery filed by the Insurers, *id.* at 46–58, and the NFL parties, *id.* at 61–80. The Special Referee also denied the Insurers' motion to compel the production of certain other documents. *Id.* at 58–61. The Insurers have appealed in full the denial of their "defense file" motion, as well as the partial denial of their "omnibus" motion to compel and the partial grant of the NFL parties' "omnibus" motion to compel. The NFL parties, which faced partial set backs on three of the five motions decided by the Special Referee—including one that now requires the NFL parties to review a substantial volume of additional documents using additional search terms and from additional custodians—have chosen not to appeal.

STANDARD OF REVIEW

The Insurers' motion should be denied no matter what standard of review the Court applies to the Special Referee's rulings. Nevertheless, when reviewing a referee's order under CPLR 3104(d), the Court may limit its review to whether the referee's order is "clearly erroneous or contrary to law." *CIT Project Fin. v. Credit Suisse First Boston LLC*, No.

600847/2003, 2005 WL 729528, at *2 (N.Y. Sup. Ct., N.Y. Cty. Feb. 25, 2005) (rejecting the argument that a *de novo* standard of review should apply); *see also, e.g.*, *Genger v. Genger*, No. 100697/2008, 2016 WL 3442353, at *1 (N.Y. Sup. Ct., N.Y. Cty. June 21, 2016) (adopting the "clearly erroneous or contrary to law" standard of review). The Court may affirm the referee's decision on any ground supported by the record. *See, e.g.*, *Emp'rs Ins. of Wausau v. Am. Home Prods. Corp.*, 238 A.D.2d 154, 154–55 (1st Dep't 1997).

ARGUMENT

The argument sections that follow address, in order, the Insurers' efforts to overturn the Special Referee's ruling that the NFL parties' privileges and protections are not undermined by "cooperation" clauses, the "common interest" doctrine, or the "at issue" theory. The NFL parties do not, as did the Insurers, separately address "relevance" because the Special Referee assumed that some of the documents sought were at least "arguably" relevant, observing that the "potential relevance" of privileged documents does not make them "subject to production." Mem. & Order at 10. Although this proposition is a familiar one, it bears emphasis that relevance, which in any event is not conceded here, has no bearing on whether the Insurers should have access to documents subject to the attorney-client privilege or the work product protection inasmuch as these protections necessarily shield discovery of even highly relevant documents.

I. The Insurers Have Identified No Error in Special Referee Dolinger's Rejection of Their Cooperation Clause and Common Interest Arguments.

Before the Special Referee, the Insurers argued that the "cooperation" clauses in their policies and the "common interest" doctrine each required the NFL parties to share their privileged and protected defense file with their adversaries in this litigation. Now, before this Court, the Insurers repackage that position and argue that the supposed "interplay" between the

cooperation clauses and the common interest doctrine requires that result. None of the Insurers' arguments—old or repackaged—has any merit.

A. The "Cooperation Clauses" in the Insurers' Policies Do Not Override the NFL Parties' Privileges and Protections.

In their underlying motion papers, the Insurers argued that the "cooperation" clauses in their policies override the NFL parties' privileges and protections, so that "the NFL Parties are contractually obligated to provide defense materials to the Insurers." Carroll Aff. Ex. 1 at Insurer Mem. 16. They further pressed this position [redacted]. *See* Watson Aff. Ex. 1 at 78:19–20 ("[redacted]").

As an initial matter, the NFL parties do not concede that the Insurers that initiated litigation against them even have a right to invoke a cooperation clause, a consent to settlement clause, or other policy conditions. As the First Department held yesterday, a carrier's act in suing its insured "constitute[s] a repudiation of liability under the policies . . . relieving [the insured] of its obligation under the policies to obtain [the insurer's] consent" to settle an underlying claim. *Century Indem. Co. v. Brooklyn Union Gas Co.*, - - - N.Y.S.3d - - - -, 2019 WL 1386927, at *1 (1st Dep't Mar. 28, 2019). Even beyond this point, we note that the Insurers did not even put in the record on their motion below copies of any so-called "cooperation" clauses, *see* Watson Aff. Ex. 1 at 66:4–7, one of many flaws in their original motion that the Court need not address in order to reject the Insurers' challenge.

Most fundamentally, as Special Referee Dolinger explained, the "short answer" to the Insurers' position on the merits of the "cooperation" argument is that it is contrary to controlling First Department law. Mem. & Order at 11. The First Department has squarely held that "cooperation" clauses do "not operate as waivers of [the] attorney-client privilege." *JP Morgan*

Chase & Co. v. Indian Harbor Ins. Co., 98 A.D.3d 18, 25–26 (1st Dep't 2012). In so ruling, the First Department affirmed a decision of this Court holding under "controlling New York law . . . [that] an insurer is not entitled, under a cooperation clause, to" circumvent the privilege. *J.P. Morgan Chase & Co. v. Indian Harbor Ins. Co.*, 2011 BL 209742, at *2 (N.Y. Sup. Ct., N.Y. Cty. May 26, 2011). Despite the indisputable fact that *J.P. Morgan* was, like this case, an insurance coverage lawsuit between a corporate policyholder and its insurers, the Insurers try to brush aside this controlling precedent by incorrectly asserting that "*J.P. Morgan* is a reinsurance case." Insurer Mem. 17. It plainly is not.

Even if it had been, that would be irrelevant. In the reinsurance context, the First Department had previously addressed "the question of whether a standard access to records clause in a contract waives any claim of privilege with respect to those documents" and "h[e]ld that it does not." *Gulf Ins. Co. v. Transatlantic Reinsurance Co.*, 13 A.D.3d 278 (1st Dep't 2004). In ruling that it does not, the First Department explained that any contrary result "would render these privileges meaningless." *Id.* at 279. The fact that *J.P. Morgan* cited *Gulf* as authority of course establishes that the insurance v. reinsurance distinction the Insurers try to make here is legally irrelevant.

Before Special Referee Dolinger, the Insurers completely failed to acknowledge the dispositive case law and did not cite any New York cases holding that an insured's privileges are trumped by a cooperation clause. It is therefore unsurprising that he summarily rejected their argument and that they now starkly admit to this Court that they "do not contend that the cooperation clauses in the policies operate to destroy a policyholder's general right to protect privileged documents." Insurer Mem. 13.

B. The Insurers Cannot Use the "Common Interest" Doctrine to Circumvent the NFL Parties' Privileges and Protections.

In their underlying motion papers, the Insurers also argued—in a section separate from the section devoted to their contractual cooperation argument—that the "common interest" doctrine requires the NFL parties to produce their defense file. Carroll Aff. Ex. 4 at Insurer Mem. 11 (defense file "materials are not 'privileged' or 'protected' from the Insurers because they fall within the well-established common interest exception"). [redacted]. *See* Watson Aff. Ex. 1 at 30:13–16 ("[redacted]").

As Special Referee Dolinger explained, this position—as with the Insurers' position on the cooperation clause—is contrary to controlling New York law. Mem. & Order at 12–16. Indeed, in New York, the common interest doctrine merely "allows" separately represented parties to share privileged communications "for the purpose of furthering a common legal interest" without destroying the privilege vis-à-vis others. *Ambac Assur. Corp. v. Countrywide Home Loans, Inc.*, 27 N.Y.3d 616, 625 (2016). The doctrine does not, however, *require* the sharing of such materials. *Id.* at 625–27. Moreover, the Special Referee held that the doctrine especially would not require disclosure where, as here, the parties are "in direct litigative conflict," and the Insurers seek privileged documents not to serve a common interest with the NFL parties, but instead for the "specific purpose" of helping to defeat coverage. Mem. & Order at 13.

In holding that the parties' litigation adversity on coverage precludes any common interest, the Special Referee was applying settled New York law. As the First Department has held, where "the parties' interests in the [coverage] action are indisputably adverse," the "mere

fact that they shared an interest in the eventual outcome of the underlying . . . litigation is not sufficient to create a common interest so as to defeat" the insured's privileges. *Am. Re-Ins. Co. v. U.S. Fid. & Guar. Co.*, 40 A.D.3d 486, 491 (1st Dep't 2007). That is true even where, as here, the insurer may have received "reports regarding [the underlying litigation's] status" and at times "discussed strategy" with its policyholder. *Id.*

Indeed, as the First Department had previously held in *Gulf*, there is "no automatic waiver of the attorney-client privilege merely because the parties had a common interest in the underlying litigation," and the production of some documents in such "circumstances does not prevent the assertion of privilege of similar documents in an adversary situation." *Gulf Ins. Co.*, 13 A.D.3d at 280. The rulings in *Am. Re* and *Gulf* were relied upon more recently in the trial court's decision in *J.P. Morgan*, subsequently affirmed by the First Department, holding that the common interest theory does not "override[] the absolute privilege . . . which under New York law, is paramount." *J.P. Morgan Chase & Co.*, 2011 BL 209742, at *3, *aff'd*, 98 A.D.3d at 23.[2]

The Insurers' decision to press their "common interest" motion before the Special Referee and again in this Court in light of the First Department's adverse rulings in *Am. Re*, *Gulf*, and *J.P. Morgan* illustrates the lengths they have gone to ignore on-point precedent. *See also, e.g.*, *Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, No. 00 Civ. 9212, 2002 WL

[2] Although *Am. Re* and *Gulf* involved disputes between reinsurers and their reinsureds, the Special Referee correctly noted that "[t]he reinsurance context of these decisions does not provide a meaningful basis for distinguishing the current case." Mem. & Order at 11 n.12. This holding is consistent with *J.P. Morgan*'s recent reliance on *Am. Re*, *Gulf*, and other reinsurance rulings. *See J.P. Morgan Chase & Co.*, 2011 BL 209742, *aff'd*, 98 A.D.3d at 23.

31729693, at *15 (S.D.N.Y. Dec. 5, 2002) ("insurer is not entitled, under the common interest rule, to gain access to the insured's communications with the counsel"); *670 Apartments Corp. v. The Agricultural Ins. Co.*, No. 96 Civ. 1464, 1997 U.S. Dist. Lexis 20689, at *3 n.2 (S.D.N.Y. Dec. 30, 1997) ("common interest doctrine is inapplicable where the insurer declines to provide a defense and takes a position antagonistic to the insured"); *N. River Ins. Co. v. Columbia Cas. Co.*, 1995 WL 5792, at *5 (S.D.N.Y. Jan. 5, 1995) ("it does not appear that any court in New York has found the [common interest] doctrine applicable merely because the parties in question are an insured and its insurer"); *Int'l Ins. Co. v. Newmont Mining Corp.*, 800 F. Supp. 1195 (S.D.N.Y. 1992) ("climate of actual antagonism between the insured and the carrier" over coverage requires denial of insurer motion to compel).

In citing *J.P. Morgan*, *Am. Re*, and *Gulf*, the Special Referee relied on solid New York precedent. In their opening brief below, the Insurers ignored this on-point and controlling New York authority, but instead quoted at length from the Illinois ruling in *Waste Management, Inc. v. International Surplus Lines Insurance Co.*, 579 N.E.2d 322 (Ill. 1991), and cited a handful of similar non-New York cases. Carroll Aff. Ex. 1 at Insurer Mem. 18–19. And they did so without acknowledging that the "*Waste Management* decision has been sharply criticized by other courts," and that there has never been any "basis for believing that New York courts would adopt its reasoning." *N. River Ins. Co.*, 1995 WL 5792, at *5 & n.2 (citing cases).[3] As even one

[3] In *North River*, North River—one of the three insurers on the Insurers' brief here—argued that *Waste Management* was an "aberrant decision" that "has been harshly criticized by many courts" and that "the majority of courts to address the application of the common interest doctrine . . . have refused to follow its holding." Watson Aff. Ex. 2 at 13 n.6.

Illinois appeals court has acknowledged, "almost every foreign jurisdiction that has considered the holding of *Waste Management* has assailed the decision as unsound and improperly reasoned." *Allianz Ins. Co. v. Guidant Corp.*, 869 N.E.2d 1042, 1053 (Ill. App. Ct. 2007). Indeed, in rejecting an invitation to follow *Waste Management*, this Court—subsequently affirmed by the First Department—held that the insurers had failed to demonstrate that "the preference that may be accorded under Illinois law for the cooperation or common interest doctrines in the insurance context overrides the absolute privilege . . . which under New York law, is paramount." *J.P. Morgan*, 2011 BL 209742, at *3, *aff'd*, 98 A.D.3d at 23.

The Insurers' argument that the opinions in *J.P. Morgan* are inapposite does not withstand scrutiny. First, the Insurers incorrectly contend that *J.P. Morgan* should not apply because it "is a reinsurance decision." Insurer Mem. 17. That assertion is untrue as a matter of fact because *J.P. Morgan* is an insurance case. 98 A.D.3d at 20. Second, the Insurers suggest that, in *J.P. Morgan*, the party asserting privilege, unlike the NFL parties, had "produced all documents in its possession relevant to the underlying claim." Insurer Mem. 17–18 (quotation marks and emphasis omitted). In fact, like the NFL parties, the *J.P. Morgan* plaintiffs refused "to produce all files relating to Bank One's defense of [the] litigation" for which they sought coverage and stood firm on asserting privilege. 2011 BL 209742, at *1. Finally, the Insurers fault the *J.P. Morgan* courts for supposedly failing to "consider the impact of the duty to cooperate and the common interest doctrine *in tandem*" (Insurer Mem. 18 (emphasis added)) even though the court in *J.P. Morgan* specifically rejected "the preference that may be accorded under Illinois law for the cooperation or common interest doctrines in the insurance context." *J.P. Morgan*, 2011 BL 209742, at *3, *aff'd*, 98 A.D.3d at 23. In any event, as we explain below, that repackaged contention also misses the mark.

C. The Repackaged "Interplay" Argument Is Frivolous.

Tacitly admitting that the positions they advanced before Special Referee Dolinger are meritless, the Insurers change tack before this Court. Instead, they now essentially concede that neither the cooperation clause nor the common interest doctrine alone requires the NFL parties to produce their defense file to their adversaries. Insurer Mem. 13.[4] Instead, they say, it is the "interplay" between the two doctrines, which must be analyzed in "tandem," that compels the result they seek. *See* Insurer Mem. 1, 13, 18, 21 ("interplay"); *id.* at 16, 18 ("tandem"). The Insurers then contend that their position "has never been directly addressed in New York." *Id.* at 19.

The Insurers' repackaged position is frivolous. The notion that the Insurers should be able to destroy the NFL parties' privilege through the combination of two meritless arguments makes no sense. Two arguments that fall short independently do not become more compelling by combining them; in other words, zero plus zero still equals zero. In tacitly suggesting that the First Department would revisit *J.P. Morgan* and *Gulf* because those cases supposedly rejected "cooperation" and "common interest" arguments separately rather than in tandem, the Insurers are asking this Court to ignore on-point precedent and to believe that the First Department would be fooled by old wine in a new bottle.

To defeat the NFL parties' privilege claims, the Insurers must carry their burden of showing that there is a legal *obligation* to which the privilege must yield. But by acknowledging

[4] The Insurers' pretense that the Special Referee somehow misunderstood their arguments and "made a point of rejecting" points they "did not . . . argue" is both patronizing and untrue. *Compare* pages 11, 13 above *with* Insurer Mem. 15.

that the "cooperation" clause does not require an insured to produce privileged documents and that the "common interest" doctrine likewise does not require such production, the Insurers have conceded that there is no obligation. Moreover, if the Insurers' "interplay" concept were correct, there would be *no* privilege left for policyholders in insurance coverage cases because in every such case the insurers could likely cite to a "cooperation" clause and assert the existence of a generalized "common interest" in the outcome of the underlying tort litigation. That is not and has never been the law of New York, and the First Department rulings in *J.P. Morgan*, *Am. Re*, and *Gulf* foreclose any such attack on the privilege.

Moreover, if the Insurers' repackaged argument were taken at face value as one that has "never been directly addressed in New York" (Insurer Mem. 19), they would thus be arguing for a new exception to the attorney-client privilege, and thus swimming upstream against a heavy current. As the Court of Appeals has recognized, the attorney-client privilege is "the oldest among the common-law evidentiary privileges." *Spectrum Sys. Int'l Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377 (1991). In New York, this longstanding privilege is "deemed essential to effective representation" of clients by attorneys. *Id.* Accordingly, New York's codification of the attorney-client privilege "vests privileged matter with *absolute* immunity." *Id.* (emphasis added). And, although there may be certain exceptions to the privilege, they are not lightly invented. *Id.* at 380–81 (rejecting argument for "public interest exception," which is only applied, if at all, in "extraordinary" circumstances); *see also Stock v. Schnader Harrison Segal & Lewis LLP*, 142 A.D.3d 210 (1st Dep't 2016) (declining to apply exception to privilege even though adopted by "a number of courts of other jurisdictions").

Here, the Insurers have offered no reason for the Court to adopt their "tandem" or "interplay" theory. Instead, they merely assert that the tandem mode of analysis has been

adopted by a few non-New York decisions reaching the result that they prefer, including, primarily, the discredited *Waste Management* opinion discussed above. *See* Insurer Mem. 18–20.

The *Waste Management* court, however, did not engage in any such analysis. Instead, it approached the cooperation clause and common interest arguments advanced by the insurers there as "two" distinct arguments, "*either* of which are dispositive." 579 N.E.2d at 327 (emphasis added). The court addressed the cooperation clause argument first, and then declared that it was "leaving this argument" to address "the second basis" offered by the insurers. *Id.* at 327–28. This approach of separately analyzing "cooperation" and "common interest" is the standard: It was the approach all parties and the Special Referee took below, as well as in *Waste Management* itself. The Insurers' brief tries mightily to create the impression that *Waste Management* took an "interplay" approach by including in a single block quotation two paragraphs from the opinion, one on "cooperation" and one on "common interest," which they separate by ellipses (Insurer Mem. 18–19) to conceal that (a) more than 400 words of text appear between the two quoted paragraphs and (b) the opinion itself makes clear elsewhere that it considers these arguments to be analyzed separately and not in tandem. *Waste Management*, 579 N.E.2d at 327–28. In any event, as Justice Kapnick made clear in an opinion affirmed by the First Department: Illinois law as applied in *Waste Management* on both cooperation and common interest is inconsistent with the insureds' "absolute privilege" which is "paramount" under New York law. *J.P. Morgan*, 2011 BL 209742, at *3, *aff'd*, 98 A.D.3d at 23.

The two other cases cited by the Insurers do nothing to further their invented position. Instead, in each, the court merely addressed *either* the cooperation clause *or* the common interest doctrine—not both—and so necessarily did not engage in any tandem reasoning. *See EDO*

Corp. v. Newark Ins. Co., 145 F.R.D. 18, 21–23 (D. Conn. 1992) (relying solely on the insured's supposed "duty to cooperate with its insurers and its implied duty of good faith and fair dealing under its contracts for insurance" to order production of privileged materials); *Indep. Petrochem. Corp. v. Aetna Cas. & Sur. Co.*, 654 F. Supp. 1334, 1365–66 (D.D.C. 1986) (relying solely on the fact that the "documents were generated in anticipation of minimizing something of common interest to both parties in this suit" to order production of privileged materials). There is simply no support for the Insurers' new "interplay" theory.

II. The Insurers Have Identified No Error in Special Referee Dolinger's Rejection of Their At Issue Waiver Arguments.

The Insurers argued below and argue again to this Court that the NFL parties have somehow put the legal advice of their counsel "at issue" by (a) "suing the Insurers in this Coverage Action," (b) "by claiming various breaches of contract," (c) by asserting "the reasonableness of the [class action] Settlement," and (d) by "alleging bad faith." Insurer Mem. 22. It is unsurprising that the Special Referee rejected their "at issue" waiver argument because the only acts of waiver they could point to were the above-cited routine allegations in the NFL parties' pleadings, which on-point New York case law emphatically rejects as bases for an "at issue" waiver. No doubt recognizing this, the Insurers now argue in the alternative that there should be a waiver because—so they speculate—the NFL parties will eventually have "no choice" but to place legal advice at issue. *Id.* at 24. Special Referee Dolinger, however, protected the Insurers against this possibility by making clear that they were free to refile their motion if and when that occurred. Mem. & Order at 16, 20, 25. This challenge to the Special Referee's ruling is meritless.

As an initial matter, the Insurers nowhere contend that the NFL parties have undertaken any "affirmative acts" that "place[] privileged material at issue and ha[ve] selectively disclosed

the [legal] advice." *Am. Re-Ins. Co.*, 40 A.D.3d at 492. They have chosen to file this motion at a stage when the NFL parties' only contentions are in their pleadings filed in response to the litigation that the Insurers launched. As the Insurers themselves acknowledge, all those pleadings do is seek to enforce the NFL parties' insurance coverage rights and to affirm the reasonableness of the underlying class action settlement. Insurer Mem. 22. Under controlling First Department law, such contentions cannot give rise to waiver, as Special Referee Dolinger ruled. Mem. & Order at 16–25.

In this regard, the First Department specifically held in *Deutsche Bank* that the "commencement of [an] indemnity action does not, in itself, imply an 'at issue' waiver of the protection of the attorney-client privilege or the work-product doctrine." *Deutsche Bank Tr. Co. of Amers. v. Tri-Links Inv. Tr.*, 43 A.D.3d 56, 66 (1st Dep't. 2007). Nor, the court also ruled, do allegations by an indemnitee that underlying defense and settlement costs were reasonable. *Id.* The First Department similarly ruled in *Am. Re* that there can be no waiver "merely by alleging in a pleading that the settlement was reasonable and in good faith." *Am. Re-Ins. Co.*, 40 A.D.3d at 492; *see also AIU Ins. Co. v. TIG Ins. Co.*, No. 07 Civ. 7052, 2008 WL 5062030, at *4 (S.D.N.Y. Nov. 25, 2008) ("act of seeking coverage is not a sufficient 'affirmative act' to place the privileged documents at issue"); *N. River Ins. Co.*, 1995 WL 5792, at *6 ("fact that North River merely placed the broad question of coverage in issue is not sufficient to constitute a waiver of its attorney-client privilege"). All of this controlling authority reflects the fundamental principle that the mere fact "that a privileged communication contains information relevant to issues the parties are litigating does not, without more, place the contents of the privileged communication itself 'at issue' in the lawsuit; if that were the case, a privilege would have little effect." *Deutsche Bank*, 43 A.D.3d at 492; *see also LILCO v. Allianz Underwriters Ins. Co.*, 301

A.D.2d 23, 33 (1st Dep't 2002) (that documents would be highly relevant does not trigger waiver).

Faced with this clear law, the Insurers argue about what they believe the NFL parties might do *in the future* to prove their claims and defenses, focusing on the NFL parties' supposed burden to prove the reasonableness of the underlying class settlement. Insurer Mem. 22–25 (asserting that the NFL parties "have no choice but to rely upon materials from the underlying defense file"). The Insurers contend that, in light of this potential future conduct, the Court should order production of the defense file now, because "delaying [its] production until late in the case would be unduly prejudicial to the Insurers' ability to prepare for trial." *Id.* at 22.

As a preliminary matter, the Insurers' argument is foreclosed by *Deutsche Bank* and *Am. Re*, which hold that pleading that a settlement is reasonable and in good faith does not provoke a waiver. And they cite no case holding—on the basis of sheer speculation—that there should be a waiver today because of what the privilege holder might do tomorrow.

Moreover, even if the NFL parties are required to establish the reasonableness of the settlement, the Insurers are wrong that the NFL parties must rely on the defense file to litigate that issue. As the First Department has held, "nonprivileged material provides a more-than-ample basis for the parties to litigate . . . reasonableness." *Deutsche Bank*, 43 A.D.3d at 64–65. This is so because in New York the reasonableness standard is "an *objective* standard." *Id.* (emphasis added); *see also JP Morgan Secs. Inc. v. Vigilant Ins. Co.*, 51 N.Y.S.3d 369, 376 (N.Y. Sup. Ct., N.Y. Cty. 2017) ("objective standard"), *judgment rev'd on other grounds*, 2018 WL 4494692 (1st Dep't Sept. 20, 2018). The reasonableness of an underlying settlement is determined by comparing "the size of the possible recovery and the degree of probability of claimant's success against the" insured. *See, e.g.*, *Luria Bros. & Co. v. Alliance Assur. Co.*, 780

F.2d 1082, 1091 (2d Cir. 1986). As this Court recently held, because the standard is objective, any litigation of the reasonableness issue "does not require . . . the legal analysis of [the insured's] counsel." *JP Morgan Secs. Inc.*, 51 N.Y.S.3d at 376 (citing *Deutsche Bank*, 43 A.D.3d at 65–66); *see also Hudson Specialty Ins. Co. v. Haley & Aldrich, Inc.*, 159 A.D.3d 1344 (4th Dep't 2018) (rejecting at issue waiver argument for "information to determine the reasonableness of the settlement amount").

Accordingly, the NFL parties will, as necessary, litigate the reasonableness of the settlement on the basis of the extensive public record to which all parties have access, as well as the [redacted] information produced or to be produced in this case, including through testimony once depositions commence. The parties are also free to offer expert testimony as to the objective reasonableness (or lack thereof) of the class settlement.

As noted, although discovery in this case is far from complete, the discovery record currently includes [redacted] NFL parties documents created before the underlying litigation. The Insurers, of course, also stand to receive additional internal NFL parties documents, including because the Special Referee granted their motion to add ten additional document custodians and 32 additional search terms, rulings that the NFL parties have not appealed. As noted, the Special Referee also granted the NFL parties' motion for a protective order, which will facilitate the production of [redacted] documents by all parties concerning the underlying class settlement that were previously exchanged by the parties outside of litigation, but which can be used by the Insurers to litigate the "reasonableness" issue. Watson Aff. Ex. 3. Also as noted, the parties have received more than [redacted] pages of documents from some of the more than 60 third parties that the Insurers have subpoenaed, and the Insurers are pursuing countless pages more. Many of these documents speak directly to [redacted]

[redacted], which the Insurers now pretend can only be explored through the privileged and protected defense file. In any event, there is nothing in the Special Referee's ruling that precludes the Insurers from filing a new "at issue" motion if and when the NFL parties actually place privileged advice at issue. In fact, the Special Referee's ruling repeatedly left that door open. Mem. & Order at 16, 20, 25.

For their part, the Insurers and their outside lawyers have the ability on their own to evaluate and assess the risks and value of the claims and defenses at issue in the underlying tort litigation and in sports tort litigation more generally. The Insurers repeatedly suggest that the settlement was unreasonable because it was reached without conducting discovery, a point—however flawed—they can make without privileged documents. Moreover, in their original brief, the Insurers revealed that they will be making other reasonableness arguments without recourse to privileged documents when they referred to the "success of other high-profile professional sports organizations in vigorously defending against similar head trauma claims." Carroll Aff. Ex. 1 at Insurer Mem. 24 n.9. The Insurers have warehouses of knowledge and experience with valuing tort litigation, including with respect to concussion-related tort claims against their other insureds, including the NCAA, the NHL, and Riddell.

The parties face no limitations in trying to develop various arguments (or expert testimony) potentially bearing on reasonableness without access to, or use of, privileged information, including based on the amounts of other settlements, the scale of defense expenditures that would have been needed to defend against (and take to trial) thousands of mass tort lawsuits in the absence of a settlement, the ranges of individual verdicts in head injury cases, and the objective legal merits of various claims and defenses that would be raised in the underlying tort litigation.

Moreover, in litigating the reasonableness of the underlying settlement, privileged documents are irrelevant for the additional reason that the tort plaintiffs would not be prosecuting their claims on the basis of the NFL parties' privileged documents. Nor would the NFL parties be defending them on that basis. The underlying tort litigation would be pursued and defended on the basis of non-privileged documents, and any assessment of litigation risks necessarily would focus on an evidentiary record of non-privileged documents.

In light of the foregoing, the Insurers' complaints about the Special Referee's so-called "'wait and see' proposal" ring hollow. Insurer Mem. 24. There has been no "at issue" waiver and if one occurs subsequently the Insurers are free to file a new motion.

III. In Any Event, the Court Should Deny the Insurers' Motion Because Their Defense File Request Is Improper Under Basic New York Disclosure Law.

Before Special Referee Dolinger, the NFL parties argued that, even apart from the obstacles posed by the NFL parties' privilege and work product protections, the Insurers' defense-file demand is improper under basic principles of New York disclosure law. Carroll Aff. Ex. 3 at NFL Mem. 31–34. Special Referee Dolinger did not reach this argument in denying the Insurers' motion. *See* Mem. & Order at 6–25. Nevertheless, that argument is a valid basis for denying the Insurers' review motion, and one they do not bother at all to mention in their papers. *See, e.g.*, *Emp'rs Ins. of Wausau*, 238 A.D.2d at 154–55 (rejecting challenge to referee's order on alternate ground to which objector "does not respond"). Accordingly, even if there were some error in the Special Referee's analysis (there is not), the Insurers' motion should be denied.

CONCLUSION

For the foregoing reasons, the Insurers' motion for partial review should be denied in its entirety.

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COVINGTON & BURLING LLP

By: /s/ John E. Hall
John E. Hall
620 Eighth Avenue
New York, NY 10018
(212) 841-1000

Mitchell F. Dolin
Michael E. Lechliter
Colin P. Watson
850 Tenth Street, NW
Washington, DC 20001
(202) 662-6000

Attorneys for Defendants National Football League and NFL Properties LLC